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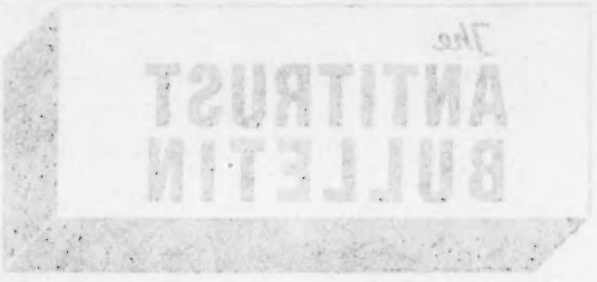

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SUGGESTED LIMITATION UPON THE 1955 AMENDMENT PERMITTING THE UNITED STATES TO SUE FOR TREBLE DAMAGES — AN ANALYSIS

by

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The 1955 Congress enacted two measures which are of particular interest to antitrust practitioners, *viz.*, the increase in maximum from $5,000 to $50,000 which can be levied as a fine against violators of Sections 1, 2, and 3 of the Sherman Act, and the amendment to Section 7 so as to permit the United States to sue for damages.[1] The first bill does not require discussion, its background being sufficiently explanatory and its language so simple and understandable that no confusion can result;[2] the grant to the federal government of the right to sue for damages, however, is of a different complexion, and it is the purpose of this paper to uncover a possible source of ambiguity, namely, can the United States sue only as a consumer, or does the amendment permit it also to sue as an entrepreneur, *i.e.*, for damages in its "business." We therefore examine briefly the antecedents of this amendment, its language in the light of its history

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1 84th Cong., 1st Sess., Chap. 281, P. L. 135, and Chap. 283, P. L. 137, respectively, 15 U. S. C. §1 et seq., both approved July 7, 1955, the latter statute taking effect six months thereafter. The Senate accepted the House's respective bills, H. R. 3659 and 4954, without amendment.

The latter 1955 legislation repealed §7 of the Sherman Act, for §4 of the Clayton Act, 15 U. S. C. §15 now replaced it completely. The single damage provision is in new §4A, but new §4B now provides for a uniform four-year statute of limitations in all suits brought under §§4 and 4A, thereby doing away with the application of varied and conflicting statutes. Section 5 of the Clayton Act, 15 U. S. C. §16, was also amended by: (a) preventing the use of a judgment or decree in a federal suit for damages by private persons, and (b) providing for the suspension of the new statute of limitations under certain circumstances. These several provisions are not discussed.

2 See, *e.g.*, H. Rept. #70, Feb. 23, 1955, and S. Rept. #618, June 21, 1955, both accompanying their respective bills, and referring to the late Mr. Justice Jackson's opinion, dissenting in part, in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 590, fn. 11, and former Judge Rifkind's comments in *United States* v. *National Lead Co.*, quoted in the Senate's Report.

It may, however, be noted that only §§1, 2 and 3 are amended, whereas §14 of the Clayton Act, 15 U. S. C. §24, penalizing directors, officers, or agents of a violating corporation, and fining them up to $5,000 or one year in jail or both, remains unaffected.

and economic frame of reference, as well as the possibilities which inhere therein, concluding with an interpretation based not alone upon the above but also upon pragmatic considerations.

1. The Antecedents of New §4A.

By §7 of the 1890 Sherman Act Congress authorized treble damage suits by "any person who shall be injured in his business or property by reason of" antitrust violations, and this was continued verbatim by §4 of the 1914 Clayton Act; the Supreme Court, however, construed "person" as not including the United States, thereby preventing the federal government from suing for treble damages.[3] The present amendment to §4, effective January 7, 1956, by the excess of language in new §4A, raises a question as to the meaning and use of this new provision which now confers authority upon the United States to sue for damages, but only for actual losses and costs, and without recovering any reasonable attorney's fee.[4] The background of this legislation discloses that in 1937, while heading the Antitrust Division, the late Mr. Justice Jackson reported "on the experience of the Government as a purchaser in the open market." [5] Being required to "purchase only on the basis of secret competitive bids," the United States was astonished to find that to "an increasing extent in widely separated areas bids for Government purchases are identical. We cite a few examples." His illustrations included one of 59 bids to supply the Navy with steel pipe, identical to the penny, *i.e.*, $16,001.83, and one of 40 bids to supply cement, each for $17,148.60. He also listed a multiplicity of articles, ranging from steel products to medical supplies, and including a reference to rubber tires, in which "practically identical bids had been or are now being received. . . ."

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[3] *United States* v. *Cooper Corp.*, 312 U. S. 600 (1941).

[4] In the *Cooper* case, ibid., at p. 606. Mr. Justice Roberts commented upon the provision of §7 which gave the injured party such "a reasonable attorney's fee—a provision more appropriate for a private litigant than for the United States." How much this statute influenced this aspect of the 1955 law is conjectural, although undoubtedly it was a thrust at the government's request therefor in the *Cooper* complaint.

[5] *Annual Report of the Attorney General*, fiscal 1937, 75th Cong., 2d Sess., H. Doc. #378, p. 37. Quotations are from this page.

Assuming that an antitrust violation could be proved, why had the federal government not previously sued for treble damages? The answer, according to Mr. Justice Roberts, might be found in the fact that in 1926 the Attorney General, responding to a Senate Resolution, had stated that the government "is not a party to suits under" §7; that for fifty years during which the statute was in force no such treble damage suit had been instituted; and that Senator O'Mahoney had previously introduced a bill, S.2719, prepared by him and the Assistant Attorney General in charge of the Antitrust Division, to enable the government to sue officers and corporations for damages.[6] Now, however, the Antitrust Division apparently determined to attempt such a suit, using later facts and figures which the 1937 Report had merely hinted at.

Naming eighteen corporations as defendants, the United States of America, in 1939, sued "in its capacity as a purchaser of commodities for consumption by the executive departments of the United States," [7] alleging the defendants "did combine and conspire and agree to fix the prices of tires on sales to the plaintiff throughout the United States." For two six-month periods, between October 1, 1936 and September 30, 1937, the government purchased its tires from these defendants, who submitted identical bids at all times, and for the next period of six months purchased its tires from a third party without requiring bids, pursuant to authority when a public exigency existed. The reason for this last purchase was that the

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[6] The references are found in the *Cooper* case, *supra* note 3, at p. 613. (Compare this proposal with §14 of the Clayton Act, *supra* Note 2.)

It is submitted that the Justice was correct in referring to the O'Mahoney bill insofar as the quoted remarks of the Senator referred to a treble damge suit "by a private person," but the reference was a poor one. A reading of 84 Cong. Rec. 8191-8192, cited by the Justice, discloses that the Senator had conferred with Thurman Arnold, then head of the Division, and that the bill, set out in full, did not amend §7 to include the United States as a person but, rather, amended the antitrust laws so as to permit the government to recover, in a civil action, double the compensation a participating officer or director received from his corporate employer, where a violation occurred, and double the corporation's total net income during each month of a violation. Such a recovery has no relation to the type of recovery envisaged under §7, and harks back to the situation in 1889-1890 when penalties of various kinds were being discussed. On this, see this writer's forthcoming *"The Consumer's Interest in the Sherman Antitrust Act,* to be published January, 1956, by Dennis & Co., Buffalo, N. Y., Chap. II.

[7] Par. 1 of the government's complaint in the *Cooper* suit, *supra* note 3, taken from the Transcript of Record before the Supreme Court, at p. 3. Additional quotations are from this source, the paragraphs and pages differing.

Attorney General had advised the Treasury Department that the previous bids were *prima facie* violations, whereupon the third series of bids was rejected as collusive. For the fourth period of six months new bids were submitted by the defendants, but now competitive and substantially lower than for the first two periods, and even below the cost of the third period. For these three periods there was no decline in the retail prices of tires to the general public throughout the country. Thus, concluded the government, if not for the conspiracy it would have been able to purchases its tires for the three periods at prices at least as low as the prices it paid for the fourth (competitive) period, and the total difference between the non-competitive and the competitive prices amounted to over $350,000, with suit now brought for three times this sum, with costs and a reasonable attorney's fees.

In the 1941 Cooper decision the Supreme Court held the government could not maintain this type of suit, as it was not a "person" within the definition of §7, whereupon, although with time out for the war, the Attorney General sought amendatory legislation.[8] The 1955 law thus enacts "the necessary statutory foundation . . . deemed essential to a recovery by the Government," and its conceded purpose is to grant the federal government "the right to recover actual damages for injuries to its business or property by reason of violations of the antitrust laws. . . ."[9] The exact language of new §4A, however, is: "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor. . . ." Obviously this prevents a suit for damages occurring prior to the effective date of the amendment, the statute being prospective and not retrospective, but the major question now raised and examined is why "business" was inserted in the amendment and, regardless of the reasons, the legal possibilities and probabilities which flow.

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[8] *E.g.*, Annual Report, fiscal 1950, p. 77 (mimeographed), referring to H. R. 1223 "now before the Congress"; see also H. R. 109, and 3406, 82d Cong., 1st Sess. (1951). H. R. 109 permitted a treble damage suit, whereas H. R. 1323 and 3406 permitted only actual damages to be recovered.

[9] S. Rept. #619, June 21, 1955, accompanying H. R. 4954, reprinted in 13 *U. S. Cong. News* 1955, pp. 3230 and 3228 respectively.

2. The Language of New §4A—Does It Permit a Suit by the Government as an Entrepreneur?

Although the purpose behind the Sherman Act is to maintain competition and to prohibit monopoly, these exact terms are not found in the statute; rather, the terms "restraint of trade and commerce" (§1), or to "monopolize, or attempt" it (§2), are included, among others, in the denounced activities. The exact language of the statute is therefore not a true indication of its ends and purposes, for no detailed definitions are given, and its vagueness is a calculated one.[10] If we look at §7 we note that a cause of action is given to any person "injured in his business or property," and the disjunctive must be interpreted, in this remedial provision, as providing for a two-way possibility. Thus an entrepreneur engages in a business and may or may not use physical property therein, while a consumer does not engage in business but may still have property in which he may be injured.[11] A person may therefore be injured in his business, or his property, or both, and we may here note that the preposition "in," not "to," is found in the Act. The interpretation given by Mr. Justice Holmes, in 1906, emphasizes the above entrepreneur-consumer distinction: "A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth." [12]

Business men, *i.e.*, entrepreneurs, were able to utilize only treble damage suits when their competitors, or other entrepreneurs, violated the antitrust laws and caused them injury,[13] but the Clayton Act's §16 (now §26 of the Code) permitted them to sue for injunctive relief, thereby enabling a combination injunction-damage suit to be maintained. Since 1890 all such private actions have, in all or in

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10 *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359-360 (1933), *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489 (1940).

11 The exact meanings of entrepreneur and consumer, and the distinction between an ultimate consumer and an intermediate one (that is, an entrepreneur who consumes during the course of his business, purchasing materials and services and transforming them into products, etc. for sale), is discussed by this writer in his *Consumer's Interest*, *supra* note 6, Chap. I.

12 *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 399 (1906).

13 The exact requirements of a suit, including the essential elements to be pleaded, are not here examined. See, *e.g.*, Comment, *Antitrust Enforcement by Private Parties*, 61 Yale L. J. 1010, 1011-1028 (1952).

some degree, alleged damage of an entrepreneurial nature, *e.g.*, injury in or to one's business, trade, competition. In some rare situations an allegation is found that the plaintiff was a "consumer," or purchased for "consumption," as instanced by the Cooper allegations above quoted. But the use of these terms has not been along the lines of the ultimate consumer, *i.e.*, the buying and consuming-for-use public; rather, entrepreneurial concepts infringed, so that (say) even though a businessman alleged that he purchased for consumption, his complaint still disclosed that he consumed in his business, for entrepreneurial purposes, *e.g.*, he consumed semi-finished material, turning out finished merchandise. The Sherman Act has generally been envisaged primarily as an entrepreneurial statute, involving businessmen, and subsequent additions, *e.g.*, the Robinson-Patman Act, have furthered this view. Even the basic F. T. C. statute of 1914 had to be amended so as to cover and protect the consumer, in order to overcome the Supreme Court's interpretation.[14] Nevertheless, the historical and legal fact is that consumers *qua* consumers do have an interest which the Sherman Act does protect, albeit the practical, financial, and legal difficulties in proving a case militate against institution of such a suit by a private person. The United States, however, is not hindered by these private obstacles, especially when its purchases amount to hundreds upon hundreds of millions and, in war, to a hundred billions.[15] In addition to alleged consumption, as an ultimate consumer, the government is also an entrepreneur, *i.e.*, it operates various "businesses" which the Hoover Commission's Report on Business Enterprises listed as being in the thousands, stating that "Many of these publicly owned enterprises compete with private business. . . ."[16]

Under the government's approach in the *Cooper* case, that it is a "consumer," and by virtue of its admitted entrepreneurial activities as shown in the Hoover Report, the United States has a double-edged sword which, up to 1955, rusted in its armory of legal weapons.

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14 *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643 (1931), requiring injury to competitors before a violation of the statute could occur; the 1938 amendment included "unfair or deceptive acts or practices" to the denounced "unfair methods of competition." 15 U. S. C. §45(a).

15 *Att'y Gen'l's Annual Rept.*, fiscal 1944, p. 15, and Brief of U. S. in *Cooper* case, *supra* note 3, at p. 9.

16 May, 1955, at pp. 1 and 3. "There exists no definitive list of these publicly owned enterprises."

Giving leave to withdraw the blade from the scabbard, has Congress polished one, or both, edges? The answer may be given on a purely legalistic basis or else one may, pragmatically, weigh the economic and political consequences and then decide. Literally, the statute now permits the United States to sue whenever it "is hereafter injured in its business or property" and this is the identical language found in Sherman §7, Clayton §4, and which present Code provisions carry forward. Under these terms private entrepreneurs have been able to sue for treble damages for alleged injuries in their businesses or properties, and under which the *Chattanooga Foundry* and *Cooper* cases were decided. Superficially, therefore, the United States has been granted power to sue for an injury "in its business" or in its "property," and the former definitely refers to a business approach, *i.e.*, entrepreneurial, whereas the latter must be able to refer to a non-business approach, *i.e.*, as a consumer, as illustrated in the *Cooper* situation. The federal government apparently has thus been given two additional methods whereby it may seek to enforce antitrust policy and simultaneously obtain redress for its damages, but is this factually so? It is at this point that pragmatic considerations enter the economic and political picture.

3. Interpreting the Amendment Via an Economic and Political Approach.[17]

Assume the United States is permitted to sue as a consumer, and not otherwise, what are the possibilities? First and foremost we may examine a war-time situation, for today and tomorrow the government, in its proprietary capacity, spends billions for defense. This governmental function, it may be argued, is of an entrepreneurial nature in that the government services the people and is therefore a

[17] It is unnecessary to point out that modern antitrust practitioners, jurists, and legislators cannot be lawyers, and lawyers alone. They must either retain, or to an extent likewise become, economists, political scientists, etc. For example, every address in the symposium on *Monopolies, Mergers, and Markets* (Federal Legal Publications, N. Y. C. 1954) Trade Reg. Ser. #1, breathes of an economic infiltration in approach, and the statutes which follow the basic Sherman Act proceed on such a thesis, *e.g.*, the F. T. C.'s economic investigations, the Robinson-Patman's required analysis. The Department of Justice had to fight for years to obtain an economic staff attached to its Antitrust Division, and it is commonplace today that no antitrust case can be prepared, defended, or decided without involving and referring to economic considerations.

middleman who purchases for re-use, but it is unnecessary to pursue this further; *arguendo,* has not the United States a renegotiation program, a contract settlement procedure, and other methods whereby it may recoup overmuch gains, etc.? Can it not insert contractual provisions so as to safeguard its interest along these lines? Since new §4A gives it only actual damages, there is apparently no dollar advantage in using the Sherman or any other Act. However, what of periods of peace, when no such emergency programs are in force? Here, it is submitted, the federal government may still act in its proprietary capacity and take advantage of its new power and sue. Nevertheless, whether in war or in peace, how much of the government's millions going solely for consumption are actually tainted with antitrust violations? No figures are available but, it is hazarded, the amount is not stupendous or overly large. In a federal budget of forty billions, with a gross national product of almost four hundred billions, a few million dollars are fleas upon the elephant which rankle, but do not harm. Of greater importance is the effect upon the national economy of such a governmental single damage suit, for if the result is to bankrupt concerns right and left, then like the gift of fire to humanity it may destroy its users and their prosperity. Again no details are available, in dollars and cents, but informed speculation conduces to the conclusion that our economy can stand these minor shocks, that the government will not find any large portion of its purchases tainted, and, finally, that no political pressure to sue, merely to appease the public, will be generated because of §4A. This last is not further developed for speculation at this point may go only so far.

The Congressional grant to the United States under §4A, as a consumer, is therefore not to be condemned by virtue of any hideous consequences one may envisage as probabilities. What of the government's status as an entrepreneur? No extended and intensive analysis can be here offered, only a few suggestions and illustrations being set forth. We must note that the 1955 amendment also repealed §7 of the Sherman Act, so that only amended Clayton §4, applicable to all antitrust violations, remains. But antitrust violations do not refer solely to the original Sherman Act—there have been later amendments and additions so that the Code sections today include statutes which prohibit or condemn much more than the 1890 law did. For example, entrepreneurs are now able to seek public aid or private redress, or both, in their efforts to prevent "unfair" competition and to

conduce to "fair" prices, *e.g.,* aid from the F. T. C. *via* cease and desist orders, and support for their resale price maintenance programs under federal and state legislation. Thus if the United States is to be considered on an entrepreneurial par with all competitors it should not alone be able to sue for damages under §4A but also seek whatever other relief is available under all situations to all entrepreneurs. Logically, this should result in Congressional approval of such a general course by enacting required legislation in all fields, and this would then result in the apparently anomalous situation of the government seeking aid from itself for injuries inflicted upon it.[18] Nevertheless, assuming that no additional legislation is enacted and the government's available remedies are today furthered solely by this addition, then even so the United States as an entrepreneur has access to a weapon of profound economic and political significance.

We may, for example, conceivably include "businesses" organized or run by the federal government such as the T. V. A., the building of ships and ordinance, post-exchanges upon military installations, and the countless others referred to by the Hoover Commission, in the government's entrepreneurial activities, and it would appear that very little in the overall American private economy is not paralleled, to a degree, governmentally.[19] To illustrate, the government's power program in the country, sparked by its experiences in the Tennessee Valley, is moving west, *e.g.,* the present Hell's Canyon dispute over federal or private building of dams; if we think of the United States as a competitor of private electric utilities both in the east and elsewhere, then is not the government, as an entrepreneur, "injured" by actions, individual or combined, which utilities engage in and which may prevent it from entering or expanding in an area? Or

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18 See, however, the treatment of the United States, "today one of the largest shippers in the Far East trade," in *Far East Conference* v. *United States,* 342 U. S. 570, 576 (1952), an injunction proceeding brought by the government under §4 of the Sherman Act because of alleged non-compliance by the shippers with §15 of the Shipping Act, 46 U. S. C. §814. The Supreme Court, in a split decision, held the U. S. had to proceed before the Federal Maritime Board prior to seeking judicial relief, that agency having primary jurisdiction. On this doctrine of primary jurisdiction, see this writer's forthcoming text in Administrative Law, Bobbs-Merrill, Indianapolis, Ind., §302.

19 We need not venture into the government's efforts to control cyclical variations in business, for there is no economic limit in this respect; federal attacks upon possible depresessions may not alone seek to flatten out to a prosperity plateau, but in a recession or trough the government may provide aids of all sorts, with a concomitant entrance into entrepreneurial activities to bolster up any business slack.

suppose the local grocer (with a chain tie-up) cuts prices to destroy his p. x. competitor and to obtain business which it is getting, may he not run afoul the Robinson-Patman Act? As previously noted, the language of §4 permits a suit for damages "by reason of anything forbidden in the antitrust laws," not solely the original Sherman or Clayton Acts, so that the United States, now able to sue under §4A and including such identical words, may range over the entire antitrust field in its efforts to recover its entrepreneurial damages. Add to this ability to sue the ability to investigate, prepare, and present, and it can be seen that any governmental suit for criminal or civil penalties may automatically carry with it a concurrent or subsequent federal suit for the simple damages possibly involved.[20] And, if the government's ventures into private fields *via* war preparations, A. E. C. efforts, housing and anti-cylical measures continue to grow, then it is not unthinkable that in time the United States will have all its fingers in the national economic pie and be a "competitor" in every line of private endeavor!

The consequences attendant upon this entrepreneurial possibility in §4A do not cease with this economic phase, tentatively explored; apart from other logical developments which the reader may envisage, the political aspects require brief mention. For example, the Ashwander holding[21] discloses that once the federal government constitutionally undertakes a project (there the development of electric power), then it is also entitled to venture into associated and required fields. The entrepreneurial interpretation here accorded §4A, together with the permitted expansion of governmental activity under (say) defense and atomic energy programs, raises the possibility of federal legislative and executive domination of local[22] and private affairs. Demagogues may well consider the possibility of appeals for votes through a simple governmental suit for damages instituted against corporations which, in the states and areas involved, may be suspect.

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[20] Also, §5 of the Clayton Act, 15 U. S. C. §16, permits the use of an antitrust decree in private suits, and the 1955 amendments do not prevent the United States from using its own criminal or equity decrees in a damage suit (although private parties cannot use a federal single damage suit in their own treble damage suits).

[21] *Ashwander* v. *T. V. A.*, 297 U. S. 288 (1936).

[22] On the supremacy of the federal government in any conflict with localities, see this writer's article on *The Jurisdiction of the N. L. R. B.*, Ohio St. L. J., Summer, 1955.

Or by the same token, legislative demagogues may investigate the Antitrust Division, and all others who make policy, as to why a damage suit was or was not brought in a particular case whether or not a criminal or equity suit was instituted. Headline hunters are head hunters, so long as their political nests can be feathered, and the recent years have given cogent illustrations in other fields. To what extent §4A may become a football of politicians, and the consequences upon business (which must take time out to defend, and use officials and money therefor) and the economy (*e.g.*, a possible decrease in productivity, the allocation of resources to non-productive fields), is hypothetical, of course, although in recent years judges, businessmen, and commentators have felt that our antitrust policy must not overlook this factor. To what extent an entrepreneurial interpretation of new §4A may boomerang and affect our "cold" or "hot" war efforts, or result in sociological and psychological phenomena indirectly related thereto, is likewise conjectural but also a possibility which cannot be left unsaid.

4. Conclusions.

Within the brief space here possible the examination of §4A has related its adoption to a background which stemmed from the Attorney General's Reports and the *Cooper* decision, to the terms actually found in the amendment and their literal construction, to the distinct possibility, or rather probability, that an entrepreneurial aspect is contained in the use of "business," and, finally, the economic and political approaches which argue against such a conclusion. Although not more fully elaborated, the final pragmatic aspects must not be left unconsidered in any judicial consideration of the statute, for these may well prove controlling. For example, in 1907 Mr. Justice White (later Chief Justice) literally re-wrote the Interstate Commerce Commission Act so as to confer primary jurisdiction upon the Commission in the fixing of rates, his opinion reading like an essay in economics and pragmatism;[23] in 1954 Chief Justice Warren reversed the "separate but equal" doctrine because "the extent of psychological knowledge at the time of *Plessy v. Ferguson*" was narrow and naive, his opinion reading like an essay in sociology, with

[23] *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907).

political overtones;[24] and in numerous instances the charge of external and internal "politicking" has been made against the courts.[25] But even more important is the (common law) approach which Blackstone urged be utilized in the judicial interpretations of statutes, that "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy. . . ." [26] On this basis the only possible interpretation of §4A is that it was designed primarily, if not solely, to permit the United States as a consumer to sue for damages.

But it is, nevertheless, arguable that Congress may still have deliberately intended to expand its remedy and to grant entrepreneurial status to the government. The answer is found in the Congressional reports on the bills, and these fail to disclose any such intent. To the contrary, they disclose the exact opposite.[27] Finally, it may be urged, the judiciary is not to amend but to apply the statute, for Congress well knew that for sixty-five years "business" referred to entrepreneurs, and it thereby continued this interpretation by adopting the language; the answer is that if we accept the exact terminology and apply it, the results reached are "so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation." Thus "The courts may refuse to regard the statute as an isolated phenomenon, sticking out like a sore thumb if given a strict, literal application; and upon the contrary may conceive it to be their duty, in applying the statutory language, to fit the statute as harmoniously as may be into the familiar and generally

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24 *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954); see also *Flemming* v. *South Carolina Elec. & Gas Co.*, 224 F. 2d 752 (4th Cir. 1955) applying the reversal to transportation cases.

25 *E.g.*, the situation under which the Legal Tender Cases, 12 Wall. 457 (1871), was decided has led to charges that President Grant "packed" the Supreme Court to obtain a reversal of *Hepburn* v. *Griswold*, 8 Wall. 603 (1870); see, on this, Ratner, *Was the Supreme Court Packed by President Grant?*, 50 Pol. Sci. Qtly. 343 (1935), Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 50 Harv. L. Rev. 977, 1128 (1941). Along similar lines, but this time that Pres. Roosevelt threatened to ignore the Court's unfavorable holding, if any, and thereby obtained the decision in *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935), see newspapers and magazine coverage of that period. Numerous other illustrations can be given.

26 Commentaries, Chase's 4th ed. (N. Y., 1914) p. 52.

27 S. Rept. #619, *supra* note 9, at p. 3230: "The proposed legislation, quote properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered."

accepted legal background, and to confine its application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place. . . ." [28]

The conclusion of this writer is that Congress and the Attorney General never intended the language of new §4A to grant entrepreneurial and consumer status in its damage suits; that only a consumer's injury may be made the basis for such an action; and that, insofar and to the extent that the United States is an entrepreneur, and suffers damages "in its business," its remedy lies elsewhere.

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[28] *Francis* v. *Lyman*, 216 F. 2d 583, 587 (1st Cir. 1954).

It may be argued that it is here proposed to have the judiciary engage in legislation and, to the extent that following the will of Congress is a phase of "filling in the details," then such is our proposal. However, the Supreme Court has engaged not alone in "legislation" but in amendment of the Constitution, in past decisions, and this is borne out by reference to the reversal of *Chisholm* v. *Georgia*, 2 Dall. 419 (1793) by the Eleventh Amendment, and the subsequent writing of the Eleven and one-half Amendment in *Hans* v. *Louisiana*, 134 U. S. 1 (1890). Illustrations of legislative re-writing include the oft-praised opinion of Mr. Justice White in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907).

REPORT ON FOREIGN TRADE CONFERENCES ABROAD

by

JOSEPH W. BURNS*

It is inevitable in a complex society that some governmental policies may conflict with each other in purpose, or at least in their operation. In the course of our study of the antitrust laws it has been represented to us that the antitrust policy of the government at times conflicts both in purpose and in operation with our foreign trade policy. Upon its organization, our Subcommittee made every effort to publicize the nature and broad extent of the study in order to call the attention of interested parties our desire to receive their points of view. In the area of foreign trade this brought forth detailed letters from many domestic organizations, associations, and corporations, and in addition, letters from the American Chamber of Commerce in London and the American Chamber of Commerce for Italy. The theme of their representations was that conditions and the laws in foreign countries differed from those in the United States to the extent that a strict application of our antitrust laws to foreign trade, investment, and patent licensing abroad raised serious obstacles which hindered American businessmen in carrying on activities which were being encouraged by our government's foreign policy. Since Senator Harley M. Kilgore, Chairman of the Subcommittee, planned to be in Europe on other Senate business, he decided it might be helpful to the Subcommittee to obtain a first-hand impression of these conditions abroad.

Following three days of public hearings in Washington, at which business organizations, interested governmental aegncies, and lawyers who specialize in the foreign antitrust field were heard, Senator Kilgore and I held conferences in London, Paris and Rome with representatives of the American Chambers of Commerce in those cities. In addition, I conferred with representatives of business and government in each of these cities in order better to appraise the conditions under which our American businessmen were required to carry on their trade and investments.

The American Chamber of Commerce in London expressed the view that the antitrust laws should not apply to acts performed outside

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the territorial limits of the United States. It believes that the best interests of our country require that they be confined, as it believes was originally intended, to activities within the United States. The London Chamber emphasized that it did not oppose our antitrust laws, but on the contrary, wholeheartedly supported our competitive system. Furthermore, it is convinced that healthy competition has been one of the main factors in the successful growth of our country, and is essential to its welfare, and that a greater measure of internal competition would benefit the United Kingdom and other countries in Europe. However, its members feel, that as guests in an alien land, they must be careful not to be too critical of the customs and methods of their hosts. They welcome the steps which are being taken to insure a larger measure of competition in the economy of the United Kingdom by the British government. However, they feel that they can do no more than wait upon events, and can neither publicly advocate more than their hosts are willing to do themselves, nor refuse to cooperate to the extent prudent under the rules of business laid down by them.

As background information, the London Chamber pointed out that under the common law of England agreements between competitors restraining trade are considered by the courts in the light of their effect upon the "public interest." Since the test in England is whether the agreement is unreasonable as "between the parties" the result has been that no one has succeeded in establishing that an agreement which is reasonable as between the parties is contrary to the public interest. Its competitors combine to fix prices, to allocate the trade among themselves, and to exclude outsiders, but it may not be at all difficult to show that such arrangements are prefectly reasonable as "between the parties." The view is taken that the courts should not lightly interfere with the sanctity of contracts and that the public may very well benefit from having reasonable and steady prices. A most important point, the London Chamber emphasized, is that the question of public interest is examined from the standpoint of the workers and owners of the enterprises concerned as well as that of the consumer.

In view of this approach by the courts, it has been left to the legislature to determine whether retsrictive prices are, or are not, contrary to the public interest. To accomplish this Parliament established the "Monopolies and Restrictive Practices Commission" in 1948, and gave it the task of conducting investigations where instructed to do so by the Board of Trade. If certain conditions are found to prevail, and

they were so instructed, the Commission was to report whether or not the practice found to exist operated, or were expected to operate, against the public interest. Where they reported unfavorably, the Commission was also instructed to consider "whether and if so what action . . . should be taken to prevent or remedy any mischief" to make recommendations if they thought fit to do so.

The Monopolies and Restrictive Practices Commission has no counterpart in our American system. The preamble of the Act of Parliament of 1948 setting up the Commission states:

> "An Act to make provision for inquiry into the existence and effects of, and for dealing with mischiefs resulting from, or arising in connection with, any conditions of monopoly or restrictions or other analogous conditions prevailing as respects the supply of, or the application of any process to, goods, buildings or structures, or as respects exports."

The duties of the Commission are to investigate and report on matters referred to it by the Board of Trade.

Section 6 provides:

> "(1) A reference of a matter to the Commission under the preceding provisions of this Act for investigation and report shall specify the description of goods to which the reference relates and may be so framed as either—
>
> "(a) to limit the investigation and report to the facts, that is to say, to the question whether conditions to which this Act applies in fact prevail, and if so in what manner and to what extent, and to the things which are done by the parties concerned as a result of, or for the purpose of preserving, those conditions; or
>
> "(b) to require the Commission to investigate and report on the facts as aforesaid and also to investigate and report whether the conditions in question or all or any of the things done as aforesaid operate or may be expected to operate against the public interest."

Where the reference requires the Commission to make recommendations, its reports are laid before Parliament by the Board of Trade.

The Board of Trade makes annual reports on the work of the Monopolies Commission. Most of the work of the Commission has been investigations of specific industries. It has made one general report: Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices, issued in June 1955.

The Commission found there were six broad categories of agreements, as follows:

1. Collective discrimination by sellers, without any corresponding obligation on the buyers.

2. Collective discrimination by sellers in return for exclusive buying ("exclusive dealing").

3. Collective adoption of conditions of sale (notably the maintenance of resale prices).

4. Collective enforcement of such conditions of sale.

5. Collective discrimination by buyers without any corresponding obligation on sellers.

6. Aggregated rebates.

On the basis of a detailed analysis of each category, the majority of the panel (7 out of 10) found that all the types of agreements examined did in general affect the public interest adversely, some to a considerably greater degree than others, and that they should be generally prohibited by legislation. They said they were particularly impressed "by the effect of a binding and collective obligation in preventing manufacturers or distributors from experimenting and from trying out new or different ways of conducting their business. Such obligations, they said, created an undue rigidity which might affect the numbers and kinds of concerns engaged in a trade, the trading methods of those established in the trade and the level of prices both generally and to different classes of buyers. They thought, however, that the use of the practices might, subject to suitable safeguards, be justified in the following exceptional circumstances:

1. Where consumers are not able to judge the standard of service which it is in their interests to demand from distributors, and the matter cannot conveniently be dealt with by legislation.

2. Where an exclusive-buying or exclusive-dealing agreement protects an industry of strategic importance or one that is peculiarly susceptible to damage from imports, and protection by Government action is impracticable.

3. Where a common price agreement is found after inquiry to operate in the public interest and agreements within the scope of their present inquiry are necessary for its effective operation.

4. Where the practices are necessary to enable small firms to compete with a very large concern which is itself employing restrictive practices.

The majority then considered two possible courses of actions:

1. Compulsory registration and publication of agreements (with subsequent prohibition of those found after investigation to be against the public interest).

2. A general prohibition of the practices, with provision for exceptions, on the grounds stated above, in particular cases.

They concluded that the second course was preferable, and suggested that exceptions should be made on the advice of an independent body which would assess the merits of each application for exception.

The three members in the minority were not prepared to say that the investigated practices were in general injurious to the public interest. They recognized that some might be injurious in certain circumstances, but did not think that industries should be prevented from using them without having an opportunity of having their cases examined individually. They thought a general statutory prohibition would create "a degree of flexibility" in the law which might in the future prove undesirable. They preferred a system of compulsory registration, with provision for the review and prohibition of agreements found to be against the public interest.

The problem of collective agreements to enforce resale prices needs special mention. The Commission drew a distinction between such agreements (which were within its terms of reference) and collective agreements fixing common prices (which are "enforced" by many of the other agreements studied but which were not considered within the terms of reference). One member of the majority and the three minority members disagreed with the majority conclusion that collec-

tive arrangements for the enforcement of resale prices prescribed by individual manufacturers in general operated against the public interest. They considered it illogical that if it were lawful for individual manufacturers to fix resale prices, they should be debarred from enforcing maintenance of those prices "in the most effective manner consistent with general law." But the minority did agree that agreements, and the enforcement of agreements, obliging all the parties to fix resale prices or handle only price-maintained goods, were likely to be against the public interest.

In my discussion with others following this conference, I ascertained that in the debate in the House of Commons on the recommendations of the Monopolies Commission report, there were sharp differences of opinion expressed. The government, it was felt, did not appear ready to adopt the majority recommendations, at least to the full extent. A government spokesman objected to the "odor of criminality" he detected in the majority recommendations. It was stated that the government proposes to introduce a bill to require registration of those restrictive practices which the government would from time to time specify. The proposal appears to be to set up a tribunal, which would select such of the registered agreements as in its view requires examination. Parties to the agreements would then have to specify the agreements before the tribunal and it would have to discontinue or modify them if the Commission so decided. It appears that no decision has been reached on the precise guidance which would be given to the tribunal, or what kind of tribunal might be created. It is interesting to note the Commission's report was limited to investigations and recommendations applied to *collective agreements* covering the specified practices and not to the practices themselves. The prohibition of collective action alone left individual firms free to employ the same restrictions and discriminatory practices without hindrance.

It was pointed out that in any study of British economic activity it must be borne in mind that there are clearly many restrictive practices which are not operated under any formal agreements among firms or traders, which are based on long-standing trade customs and on the traditional British feeling for "playing the game." A typical British business director probably still feels there is something ungentlemanly and vulgar about too much competition. It is probably this same feeling which accounts to a large extent for the general public apathy which exists toward the whole problem of restrictive practices. It would

appear that no legislation can easily or quickly change this basic economic philosophy.

Until such time as Parliament orders their discontinuance, it appeared that price and other agreements are perfectly lawful in England.

The London Chamber pointed out that economic stability is an important objective in British trade and measures which are taken to accomplish that objective and to protect that interest of traders are accepted by all segments of the economy including the labor unions, as long as they do not fall into categories which the Commission has criticized. The British approach is quite different from our own. There is a tendency to recognize the desirability of fixed and stable prices. Many of the trade associations actually fix their prices and this is expected by all segments of the community. The emphasis in England is on efficiency and economy, on the encouragement of new enterprise, on the fullest use and best distribution of men, materials and industrial capacity, on the development of technical improvements, and the expansion of existing and the opening of new markets. The existing restrictive arrangements protect the small, and perhaps the less efficient producer which is the British method of keeping the small man in business.

When foreign businessmen, including Americans, go into England, they must conduct their business as it is conducted there. It is not always easy for the foreigner to get into the local "club" but it would be equally difficult for him to survive if he did not play according to the local rules. The government does not tell businessmen what to do or what not to do. Each industry in trade makes its own rules, some very loose, some very tight, and in many cases no rules at all. The problem of finding out the rules and observing them is one of the essentials a foreign businessman has to learn.

The London Chamber stated that the principals recently enunciated in American courts that American companies cannot enter into arrangements with competitors abroad to form joint companies, partnerships, or other joint ventures which provide that the American parent will not compete in the British market with the joint venture or its own subsidiary, appear to introduce an alarming limitation on the American freedom to trade or invest in foreign countries.

An instance was cited by the London Chamber where an American company abandoned its British venture because of the interpretation

of our antitrust laws. This was an important American manufacturer which owned for a great many years a 49 percent interest in a British company manufacturing similar products in England. The agreement provided for the exchange of technical information and know-how and certain markets were reserved for each company. When the American company came to realize that it was vulnerable to the then current interpretation of our antitrust laws, it renegotiated a new agreement with the British company in an endeavor to satisfy our Justice Department. The Justice Department, however, would not accept the new agreement and pressed the American company to divest itself of its interest in the British company. At first the American company decided to stand trial, but finally accepted a consent decree whereby the American company trusteed all of its stock in the British company to independent trustees to look after the beneficial interests of the Americans. The officers of the American company were enjoined from communicating with their former British associates. This was an intolerable situation for the American company, as it thereby lost the management authority in the British company and lost the power to say how its own capital contributions should be used. Under the circumstances it took the first opportunity to sell its holdings in the British company. Now this very important American company, which has plenty of competitors both in the United States and abroad, has been driven from the foreign field to the detriment of the best interests of the United States. At the same time the British economy has been deprived of the benefits of the know-how of a very substantial industry.

A feeling by the London Chamber that as long as international business arrangements do not operate in the United States, their validity must be determined by the law of the place where they operate and not by American laws. They feel it constitutes a direct interference with the internal affairs of a friendly nation for us to declare unlawful business arrangements which operate in that country and are lawful there and do not operate in America. For example, investors in a joint enterprise, to which an American concern is an important party, may suffer substantial losses if at a later date it is decided that the arrangement is unlawful under the American law and that the American concern is prohibited from participating further or is required by American courts to compete.

The London Chamber advocates adherence to the principle stated by Mr. Justice Holmes in the *American Banana* case to the effect that

the character of an act is lawful or unlawful must be determined wholly by the law of the country where the act is done. For those who are devoting their lives and energy to promoting the foreign trade of the United States, this appears to point the right way to proper international business conduct. They consider it inappropriate for us to insist on our right to apply our laws to their two operations within British territory. They feel that a due regard for international comity requires that the British be left from interference on our part when it comes to establishing and maintaining the terms and conditions of trade in their own country.

It was pointed out by the London Chamber that we have been spending vast sums on foreign aid to help friendly foreign countries build up their economies to establish with a bulwark against communism. Private American enterprise can help the American objective by contributing know-how and capital to enterprises in these foreign countries. This method gets down to the root of the problem and saves the American taxpayer. They feel that the attitude of our Department of Justice is a positive deterrent to the dissemination of American know-how and of capital investment abroad and obviously prejudices the welcome which our hosts are willing to extend to American businessmen. This tends to block and retard the very farsighted policies of foreign development and the strgenthening of our allies which Congress has so wisely and consistently supported since the war. They believe that the present impact abroad of the antitrust laws was not the result of deliberate act or acts of Congress, but rather in a large interpretation of those acts by the Department of Justice. By such interpretations they feel the Department of Justice has unfortunately not only done great monetary damage to American business abroad, but has lowered the prestige of the United States as well. Some of the suits which have been instituted by the Department of Justice have seemed so grotesque to people in foreign countries as to bring ridicule on the good name and common sense of Americans.

It is incomprehensible to American businessmen abroad that their government should pursue them in their legitimate business projects, and endeavor to encompass them with laws which were obviously intended to apply to Americans operating at home. No one in America is harmed by any arrangement which an American company might make in a foreign country with a national of that foreign country, which arrangement is to be wholly operative outside of the state.

The London Chamber regretted the action of the Department of Justice in whittling away the authority granted by Congress in the Webb-Pomerene Act which it feels provided adequate protection for competition within the United States. It cited an instance where several American companies engaged in the same line of manufacture and sales joined together under the Webb-Pomerene Act to form a joint enterprise to manufacture and sell their products in many of the foreign countries of the world. Eventually as business grew, and the joint venture learned more and more about this foreign business, and because of various tariff situations in many foreign countries, they logically established factories abroad in strategic places where their American manufactured products could not enter or were priced out of the market. These factories abroad prospered. Now, at this stage, our Justice Department brought suit against these companies in America, the result of which was to break up the foreign venture which had been established under the Webb-Pomerene Act and to force these American companies abroad to compete. It is a very serious and costly matter to break up a going business, but this actually was done to the great harm of the American companies. Now, instead of having one selling organization abroad which could be handled with the lowest overhead and in the cheapest manner, each one of these companies must maintain separate overseas organizations, which adds to the cost of selling American goods. The sad thing is that these American companies today are not prospering in the same manner as they did when they operated abroad conjointly. The action of the Department of Justice was destructive of American enterprise and investment abroad.

The London Chamber stated that one of the favorite ways for American companies to profit by their patents and know-how is to license foreign companies to manufacture the American product abroad. This nearly always automatically grants a certain exclusive territory to the licensee, and the Department of Justice appears to hold that this process is an infringement on our antitrust laws. A case was cited where an American company found it could not sell its product within a certain foreign country. It had an opportunity, however, to license a local company to manufacture its product, and it wished to do so and also to confine the sales of that product manufactured by that specific foreign company to that same country. The American company's lawyers were advised that the Department of

Justice would hold this licensing agreement as unlawful, and the American company therefore had to forego any profits which it might have made out of this licensing arrangement. The result is that none of the products of this company are sold in that particular foreign country, and the American economy is deprived of the earnings of that American company and the American Government is deprived of the taxes which it might have received on the earnings of that particular American company.

The London Chamber believes that the American national interest is not served by such interpretations of our antitrust laws. It feels that such interpretation does our country and our interests a great disservice. In the past our State Department has welcomed such business deals abroad because of the fact that they were positively in the national interests of our country, only to find that the Department of Justice has attacked the arrangements on its own narrow interpretation of the antitrust laws.

The London Chamber expressed the view that the only hope of Britain's survival economically is to enlarge and perfect her industries. This fact dominates her thinking and action. It is true that British industry today welcomes American participation in its strenuous effort to accomplish this. It seeks energetically to share in American know-how, engineering skill, production techniques and distribution methods. Productivity teams have returned from America not only with a great deal of knowledge of American methods and skills, but in a great many instances with ties and associations that can mean a great deal for Britain and open avenues of trade for many American businesses. This is a two-way stream of knowledge, as similar benefit has passed from Britain to our country.

It believes that it is of the greatest importance to both countries to protect and foster these ties and associations rather than to impede or even destroy them. Yet one of the greatest obstacles to this healthy and vital development is the destructive effect of our antitrust laws, which have been interpreted to discourage arrangements abroad.

As an example of undesirable antitrust activity by the Department of Justice it cited the case where an American manufacturer acquired an investment in an English company engaged in the same line of production in this country. This investment was substantially less than 50 per cent, but the two companies had an agreement that the parties would make available to each other technical skill and know-

how, and would not manufacture or sell in each other's territory. The arrangement was not limited to the United States and Great Britain, but applied to many other countries as well. Proceedings were instituted in the United States under the antitrust laws against the American company, and as a result the agreement was cancelled. The American company also sold its investment in the British company.

Instead of the result being (as perhaps the law intended) that the American company entered the territory of the British company and actively competed with it, all that has happened is that the co-operation between the two has ceased and the American concern has lost its British investment. There has been no competition, and there is no prospect of any competition. There is no doubt that this action handicapped the British company, and there is no doubt it did not benefit the American company.

This sort of thing discourages British companies from effecting arrangements with American companies when there is a risk that, after having done so, such arrangements would be cancelled because of the impact of the antitrust laws. This can only mean that British companies will avoid arrangements with companies in the United States and will seek to effect ties with Continental companies, with which they can enjoy freedom of uninterrupted trading.

The London Chamber feels this kind of development is doing our country a lot of harm. It questions the desirability of driving American business out of this kind of association. It inquires why the British, who want our help, finance, skill, and know-how, should be forced to turn to the Swiss, Germans, and others on the Continent. It feels that our antitrust policy is deterrent and discouragement to American association with foreign companies. It is not helping us, and in many instances it is depriving countries which it is our policy to support by providing the benefits of our trade and skills.

Regardless of the ability of businessmen in the United States to conduct their business with the great uncertainties of the antitrust laws, in foreign countries these uncertainties are a serious handicap. Foreign concerns do not understand our laws and do not like making arrangements which may later have to be broken.

In answering the contention that arrangements and agreements made abroad may have consequences within the United States, the London Chamber expressed the view that unfavorable consequences

to our country now obtain under the present interpretation of our antitrust laws. They cited these consequences as follows:

(1) The discouragement of our overseas investments.

(2) The loss of income to our country, with its consequent harmful effect on our economy.

(3) We will lose our association with overseas industry, with all the benefits this provides.

(4) We shall drive our overseas associates to seek arrangements with other companies in other countries, where freedom to trade exists.

(5) We shall miss a great opportunity to promote international goodwill, and shall prejudice our position of friendliness and stifle international goodwill towards us.

(6) We risk being isolated.

The London Chamber disagreed with the point of view expressed at our hearings in Washington that any relaxation in, or change in, our antitrust laws with respect to foreign trade might set a bad example since other countries were gradually coming around to our ideas of free competition. It believes that the possibility of any other countries adopting anything like our antitrust laws is far in the distant future. In the meantime we should approach it slowly by setting an example of the right way to approach the expansion of overseas trade. We should endeavor to avoid attempting to impose our laws on activities of other countries, but strive gradually to educate them to the benefits to be derived from free competition in a free enterprise. Until such time as they determine to accept this, we have no right to impose our laws on them, to the detriment of our industries and our country.

The London Chamber feels that the antitrust laws are in effect saying, "You cannot do business abroad." It feels that if an American manufacturer were able to export his product into any other country competitively, he would do so and would not seek to establish an association with any company in another country. It is because he is unable effectively to compete in England and other countries that he seeks the next best thing, which is to establish some association there. He

would not lose at all, but would gain something from it, either by an investment in a company in England or by establishing an arrangement for the exchange of know-how which would contain some stipulations as price, territory, etc. His objective would be not to lose trade, so he would make the best arrangement he could to keep himself in trade. While competition is of great benefit to everyone, it is not always the most important thing and should not be our sole aim. There are other vital factors which do provide even greater benefits to mankind than competition may do. When an importing agency is started in England, the parties do business as long as possible, but when economic law steps in and prevents them from continuing, then they may have to switch to a licensing agreement or some other method which is agreeable to them both. This is the only alternative from being stopped from doing business.

In a memorandum submitted to the Subcommittee by the London Chamber following the conference, it was stated there are four fundamental objections to our present policy of applying our antitrust laws to the activities of our nationals resident abroad:

(a) Penalties are imposed on American nationals which cannot properly be imposed on the nationals of other countries, thus putting Americans at a severe competitive disadvantage to foreigners.

(b) Confusion and uncertainty are caused by creating conflicts with foreign laws and customers and subjecting Americans abroad to dual standards.

(c) Other nations are deprived of the benefits of cooperation with American business.

(d) The application of our laws to acts in foregin countries constitutes an intrusion by us into the internal affairs of other nations, an interference with their exclusive right to regulate trade within their own territories and a serious breach of the comity of nations.

The Londan Chamber stated it is frequently pointed out abroad that insistence on price competition tends to drive trade into the hands of a few large strong companies and that the anomalies and contradictions in our antitrust laws result from efforts by our Congress to pro-

tect small business men against the competitive drive of big business. In Great Britain and on the continent trade associations, cartels and other cooperative arrangements are largely designed to protect small business, to enable it to survive against the more powerful and frequently more efficient large organization. Although it is recognized that the consumer may sometimes benefit from the greater efficiency of large concerns and from the fierce rivalry which commercial giants so frequently engender, it is pointed out that there are not as many business opportunities in small countries as there are in large and very often protection of the small business man is the greater social good. Cooperative arrangements which prevent his destruction are thus tolerated and often encouraged in many countries.

Furthermore, trade cooperation does not necessarily exclude some elements of competition. Even among members of long established associations there is frequently keen rivalry in service and quality and in many cases there is price competition as well. Sometimes, it is pointed out there is even more price competition than in America as our restrictions against discrimination in price to different customers in the same class do not apply.

It stated that it is not always realized abroad how radically the judicial interpretation of the Sherman Act has altered during the past ten years. Joint arrangements made outside the United States with foreign competitors which before the war would have been regarded as beyond the reach of the Sherman Act or otherwise lawful have been declared unlawful, with the result that, not only have our own nationals suffered but foreign nationals, such as Imperial Chemicals Industries Limited, have been brought into our courts and compelled to conform to the newly interpreted requirements of our law in foreign markets, such as Canada, Argentina and Brazil.

Recent decisions have added to, rather than dispelled, the confusion and uncertainties of our laws as they are applied to operations abroad. Lawyers seeking to protect their clients from prosecution have leaned heavily on the side of caution, with the result that for all practical purposes in this field of law the remotest parts of Asia and Africa are treated as if they were states of our Union. The antitrust difficulties of the Persion Consortium illustrate these uncertainties and the extreme attitude of the Department of Justice.

It is no answer to say that "reasonable" restraints abroad are permitted, as no one can yet say what are reasonable and what are

not. The detached observer might readily have remarked that a combination to salvage the vast petroleum wealth of Persia and to keep it from the hands of Communist Russia would be eminently sane and reasonable, but the Department of justice thought otherwise and after all what the Department of Justice thinks, responsibly or not, is what counts so long as the present uncertainties of the law remain.

In the opinion of the Chamber, no half-way measures can remove this confusion and uncertainty. Only a simple, clear-cut rule that acts performed abroad are beyond the scope of our law will enable our nationals effectively to increase our trade and investments abroad.

The Chamber stated that agreements for the exchange of secret information and know-how require some form of restriction upon competition between the parties, it is not to be expected that an American manufacturer would make available trade secrets to a British concern in the same line of business if the effect of this were to create another competitor within the United States. Correlatively, the other party would be equally anxious to avoid giving information to Americans which would introduce a competitor in the United Kingdom. It is thus customary in arrangements of this nature to stipulate that the parties will not compete in each other's territories. Similarly, investments by Americans in manufacturing and distributing organizations abroad frequently involve agreements not to compete. Because such arrangements may be construed to constitute direct restraints of our foreign commerce, our antitrust laws are preventing their conclusion.

It stated that there is no doubt but that our general philosophy has had considerable impact on the commercial life of other countries. We find antitrust laws coming into fashion not only where labor governments are in control but also where conservatives, as in England, regard it as politically desirable. At the same time we find that proposals are frequently different in fundamental respects from our Sherman Act and there are numerous instances of violent rejection of our philosophy and methods. For example, both Germany and Japan are rapidly discarding the legislation which our occupying authorities imposed upon them. Although there are indications that Germany will retain some measure of regulation over discriminatory trade practices (and Great Britain is moving in the same direction) there appears to be unanimous disapproval of our fundamental philosophy that competitors should not be permitted to regulate trade among themselves.

The London Chamber stated our insistence on active competition by our nationals in foreign countries constitutes not only an intrusion into their affairs; it is also an active interference with the exclusive right of the territorial sovereign to regulate trade in its own territory.

It is a direct interference with trade in foreign countries for our law to require American parties to foreign contracts to breach such contracts by refraining from performance. It is also an interference with such trade for us to require Americans to break up foreign combinations, such as partnerships and joint companies, which operate outside our borders and in accordance with foreign law.

It is not an answer that, in the future, our courts will somehow be admonished to avoid interfering with the legality of contracts and combinations which are lawful where they are made and operate but that they are to be left free to punish our nationals at home for participation in contracts and combinations which, according to our notions of antitrust, restrain our foreign commerce. The effect would be the same; to force American parties to break contracts and retire from combinations into which they have previously entered.

It is only by drawing a clear distinction between operations abroad and operations within our borders that this interference can be avoided. We should not punish our nationals for their participation in foreign ventures which operate abroad and are lawful where they operate any more than we should punish foreign nationals for what they are permitted to do in their own countries by their own laws and customs.

The London Chamber stated that it does not like cartels. However, we cannot remake the world by applying our antitrust laws to foreign cartels or prohibiting our business ventures from participating in them and at the same time expect our trade to prosper to its maximum abroad. If we conclude that American participation in foreign cartels and trade associations does seriously prejudice our own rights and interests, then it seems to the London Chamber that there is no alternative for Americans but to stay at home.

We sincerely believe, however, that no such prejudice can result. On the contrary, American participation in foreign arrangements will not only mean more foreign commerce for us but it will enable our nationals to have a voice in important foreign commercial arrangements. We consider it essential that we participate actively in the commercial life of the world outside our borders. We feel that the

skill and integrity of the American businessman is one of the best means we have of preserving peace, promoting goodwill and establishing a respect for a healthy capitalistic system. We feel that American business should be trusted and encouraged to trade abroad in accordance with foreign laws and customs and that, whether we like them or not, we as a nation must respect those laws and customs and not attempt to interfere with them or to destroy them.

Conferences which I had with British businessmen supported in general the observations of the American Chamber of Commerce. The British businessmen do not appear to be concerned about the difficulties of importation of American products into England, as any hindrance to such American importations simply eliminates that much competition. But in the area of joint manufacturing ventures and patent license agreements, they expressed a vital interest. Since an American company cannot set up a plant in England without the permission of the Board of Trade, the British businessman who wishes to have a joint venture with an American company cannot see how any competition is affected between the American and the British company by permitting the joint venture. If the Board of Trade concludes that it is in the public interest to permit a joint enterprise, it will grant permission not only for the American company to become a partner but to export at least part of the profits in dollars. Currency restriction is an important element in this problem. But even eliminating the currency restrictions, the British manufacturer who obtains a license to use American inventions in England does not want to be met with competition from America for the products which he makes pursuant to the license with the American manufacturer. Furthermore, the British manufacturer who depends upon export to various parts of the world will not wish to grant to an American company in the United States the right to use his inventions if he must also permit the American to import into England.

At the conferences in Paris and Rome with the American Chambers of Commerce, the same viewpoint expressed by the London Chamber was reiterated. Therefore, this report will cover the viewpoints of French and Italian businessmen and government representatives who were interviewed.

France enacted its first antitrust law on July 19, 1952 which was implemented by a decree promulgated in August, 1953. This provides for a technical committee to inquire into cartel and monopoly practices.

This committee reports to a commission of twelve members, which renders a decision. The Government is not bound to follow the decision, although it generally does so. Matters investigated are generally of an industry-wide nature rather than particular company practices as in the United States. It was stated that there has never developed any real enthusiasm for the American type of antitrust laws as there is no general feeling against restrictive practices. In fact, in times of economic crises and when there is over-production, even the Government permits restrictive agreements which it believes beneficial to the community. The economic necessity on occasion to eliminate some competition was illustrated by the railroad repair business in which there were forty separate concerns. In view of the nature of the railroad operation, and the speed with which trains now travel, the country did not need so many concerns. Accordingly, the Government asked for a reduction to twenty-two repair concerns and the others had to shift to some other form of business. This was necessary to decrease the cost of production as there was not enough business to keep forty concerns in operation.

The Government believes it is necessary to consider many other factors besides the consumer. It was pointed out that in France they have apparently emphasized the social aspects too much, whereas in the United States, such as in New England, these aspects have been underemphasized. An important factor affecting competition in France is that the Government fixes minimum wages as well as minimum prices. French businessmen are not as dynamic as those in the United States and there is a tendency to have too many small firms. It might be more desirable to have dynamic businessmen concentrate some of the small firms by merger into larger units.

Some French businessmen pointed out the necessity for some large companies working together to produce new developments. For example, in the field of petro-chemicals they consider it essential for large petroleum and large chemical companies to work together jointly in order to get the benefit of an interchange of their know-how. As a matter of principle, the French businessmen expressed strong objections to the United States attempting to assert jurisdiction over acts committed on foreign soil.

Some French businessmen expressed the view that it was very difficult to make patent licenses with American companies due to the great deal of confusion with respect to the antitrust laws. One company

found great differences of opinion among American lawyers as to exclusive licenses, non-exclusive licenses, or exclusive licenses with the right to sell its own products in the country of the licensee. Lawyers for some American companies will not permit their clients to make exclusive licenses, while others do. This makes it very confusing for the French businessman in trying to negotiate the terms because it is difficult to know to what extent the American is acting in good faith in declining to grant an exclusive license in France to the French company.

As a practical matter, with respect to many of the products which are the subject of the patent licenses there is no competition between the French and the American products, so that the exclusive license does not actually keep out any American products from France. For example, in connection with the manufacture of pharmaceuticals, there is no point to the American antitrust law insisting upon the right to import such products into France. In the reverse situation, there cannot be any competition in the United States from French exports because of the American tariffs. All of the European businessmen interviewed questioned the sincerity of the advocates of free competition in international trade under the antitrust laws in view of the high tariffs which the Americans use to keep out foreign products.

Another factor which should be taken into consideration is that in Europe the quantities produced are generally much smaller than in American factories, with consequent higher costs of production. In many instances the cost of the French product made under an American license costs more than the American-made product, so it would be impossible to sell it in the United States in competition with the American product. Some American lawyers contend that they cannot grant an exclusive license to a single French company, but must grant non-exclusive licenses to any French company if it grants one. French businessmen cannot see how this aids competition, but contend that it in fact restrains competition. They pointed out, as an example, that DuPont had a monopoly on nylon, and granted an exclusive license to an English company. The result was that other English companies had to find a product to compete with it; so that the result was the invention of dacron by an Englishman. Similarly, a German invented orlon to compete with dacron and nylon. If all of those countries had had the benefit of the nylon invention with non-exclusive licenses, they would not have had the incentive to seek competitive products and

might not have come up with dacron or orlon. The granting of an exclusive license, therefore, forces competitors to engage in research with resulting benefits to the public.

There are many reasons why American companies should be permitted to grant licenses in foreign countries rather than be compelled to engage in trade in their own products. For one thing, an American company endeavoring to sell its own products in Europe would have to set up a sales organization. It would have to contend not only with competition, but with customs and practices with which it was not familiar. Since currency controls at the present time effectively restrain American products from being imported into most European countries, it is better to permit the American company to license a European company and obtain what it can from royalties. It is much more practical than to require the American to invest its own capital in a manufacturing plant in a foreign country. Experience has shown, they contend, that an exchange of patent licenses and know-how by large American and European companies results in new developments which benefit the public. The French are anxious to license their inventions to Americans for use in America in order to obtain the corresponding benefit of American inventions for use in France. However, it is essential that the French licensee obtain some protection from importation of products of the American manufacturer who grants the license, assuming that currency restrictions would permit such imports. If the French company is going to make an investment in a process or equipment to make products under an American invention, and perhaps also use the American company's trademark, it does not wish to make heavy expenditures and build up a market only to have the American product come in and undercut it. In many industries, the French market is comparatively small, and it is essential to have an exclusive license for a period of at least a few years in order to build up the business and supply the market without danger of having it cut into by others. In some instances, with mass production techniques, even the entire French market is not large enough to support economical production. In such instances, a French company would require an exclusive license in one or two other European countries in order to assemble a large enough market to make production economical. It was pointed out that the size of some European countries is smaller than some American states and that an American company would hesitate to have its sales limited to any one state. Until such time as there is a United

States of Europe, the entire European continent must be considered in determining the extent to which patent licenses should be limited to particular areas.

The hesitancy of American attorneys in allowing their clients to grant exclusive rights to manufacture in France has caused losses to the American companies. One instance which was cited was where a French company would not risk manufacturing under the American invention without an exclusive license, so the particular product was not made for several years. Finally a German company came along with a process similar to the American company and granted the exclusive license to the French company. The result of this hesitancy on the part of the American lawyers was to deprive their client of the benefit of royalties for several years, while depriving the French consumer of the benefit of the product. These products were absent from the French market because of the uncertainty of the American antitrust laws. The product was one which could not have been imported into France at the time.

The economic conditions in Italy are different from those in France and England. Since Italy has no antitrust legislation, exclusive dealing agreements and restrictive practice arrangements are perfectly legal. In fact, economic conditions in Italy resulted in legislation approving restrictive agreements. The crisis which turned into the depression of 1929 in America came much earlier in Italy. After World War I, the productive capacity in Italy was so far in excess of demand that in 1926 a law was passed which, in effect, authorized restrictive practices. Later the depression caused the enactment of laws in 1932 and 1936 specifically authorizing the formation of syndicates. Although these were considered temporary measures they are still on the books. These syndicates were encouraged to pool their resources for export and to control production. The Government actually forced industrial combinations, even making tax exemptions for them. The difficulty was that the industries adopted the parts of the laws which they liked, and ignored the other parts which were intended to produce certain economic results for the benefit of the community. However, the result is that these large combinations exist under the law but without adequate state control.

By 1950 there was feeling that the time had come to curb the activities of these combines in order to overcome what many considered to be the damage they were creating to the economy. The objective

was not to eliminate the combines but to control them so as to reduce the damage they were doing. The purpose was to require registration and give publicity for the agreements so that the people would know what was going on. If the combination failed to file its agreement, then it would be held illegal. The proposed bill would have created a commission of citizens to pass on the effects of the operation with the syndicates. Their decision could be either to control the prices fixed by the combinations or dissolve them. The objective was to eliminate undesirable practices—not to break up the combinations entirely.

Under existing law the Italian Government does have weapons which it could use to limit undesirable effects of very large companies. For example, there is a basic prohibition of imports into Italy which is modified wherever the government feels that imports are desirable. Also, Italy has tariffs on many products. If the government feels that a large company is becoming too powerful it can allow competitive products to be brought in from foreign countries and also can remove tariffs so as to create more competition. Furthermore, the government has the power to fix prices in Italy. As a practical matter, however, the problem would be to get governmental officials with the courage to take necessary steps to counteract the effects of large size or monopolistic practices. As in other countries of the world, a very large corporation has influence among legislators and government officials, so that it is very difficult for the public to get relief.

The Italian businessmen feel that they are affected adversely by the American antitrust attitude towards foreign investment and patent licensing. They pointed out that there is a big difference between the Italian and the American market. The Italian market is very small and the risk is very great because modern techniques create mass production. Since a new enterprise requires such a great risk, the Italian company wishes to divide the risk as it is necessary to develop the market, which is a slow process. Another reason why an Italian company prefers a joint enterprise over a straight patent license is that the patent license would require the payment of a fixed minimum, plus annual royalties in dollars, and it may be difficult to obtain governmental permission to export the dollars. The third reason is that Italian companies have a very great desire to obtain American technical assistance which they need very much. From the standpoint of the American company desiring to manufacture in Italy, it gains the benefit of having the Italian partner obtain the financial loans as it is

easier for the Italian to do it than for a foreigner. Another important reason is that from the standpoint of employing labor there is a better political and social relationship if the company is part Italian. The Italian confederation makes contracts for the whole industry and if an American subsidiary could not adjoin this combination it would be in a very difficult position.

In the southern part of Italy it is essential that an American company, wishing to have a plant, join with an Italian company. This is because the government has set up a Fund for the South, a credit agency which provides low rates of interest for Italian companies. Their purpose is to encourage industries to establish in that region. This agency would not give low rates to an American company because it would be exporting the revenue, whereas the purpose of the Fund is to encourage the revenue to remain in that area.

As in France, the Italians pointed out that the size of the market is a very important factor. In some industries the Italian market is so small that a particular factory can take care of the demand in several small countries. Accordingly, it is necessary to have an exclusive license or a joint company in one "soft" currency country which can ship the products to other "soft" currency countries, such as Belgium or Germany. Granting an exclusive license or setting up a joint company in the "soft" currency countries does not reduce competition from the American firm because the American cannot export into those countries due to the dollar shortage.

The Italian businessman does not consider that granting an exclusive license makes for monopoly. For example, if an American company granted an exclusive license to an Italian company to make an electrical appliance, while this would preclude the American company from shipping into Italy, the public would nevertheless have the benefit of competition from other appliances, both from other American manufacturers and other foreign manufacturers. Since there is competition among the products of many manufacturers, they do not feel that it is essential to the enforcement of our antitrust laws that the Americans insist on competition in Italy between the Italian licensee and the American licensor. In the case of industries where there are several competitive appliances in Europe, it would be a great aid to an Italian company to get the benefit of an American technique and patent license. It would create more competition within Europe.

Many manufacturers in Italy are not as progressive as Americans in many industries, so that they would be entirely out of the market of some new product such as chemicals if they did not obtain licenses from Americans. There would still be considerable competition as Italian companies which did not obtain an American license would seek one from a German company.

The advantages to Italy of obtaining American technique may be illustrated by the case of a food packaging process. An American company packaging food products, such as cookies and other foods in attractive and sanitary packages, permitted the use of its methods in Italy. The result of this favorable style of packaging was to increase the production of certain products as much as tenfold.

An other example of an industry where a license for more than one country would be essential is in machine tools. While Italy does make machine tools, it does not make the very high precision instruments because its market would not be sufficient to absorb the output of the very special machines which make them. Accordingly, Italy must import them from abroad. If an Italian company could obtain a license from an American company to make these machines, it would benefit the Italian economy, but it would require a license for several countries since the Italian market is not large enough to use the output of an up-to-date factory.

The information received in London, Paris and Rome, added to that presented at the hearings in Washington, will be of great assistance to the Subcommittee in determining what, if any, legislative action should be recommended in the field of foreign trade and foreign investment.

THE EQUALITY OF OPPORTUNITY BILL

by

HENRY J. BISON, JR.*

What direction will future national antitrust policy in distribution take? Will it strengthen or weaken the principles applicable for the past twenty years?

These questions are of particular interest today because of the attention being given to the application of the antitrust laws to distribution practices.

At present one of the chief focal points of attention in this field is the prohibition against harmful price discrimination provided under the Robinson-Patman Act of 1936.[1]

If there is to be any basic shift in direction or emphasis, under our system of constitutional government the decision should be made by Congress.

Looking at the question of future policy from this view, a good indication of what the answer will be may occur when Congress considers the Equality of Opportunity bill.[2]

This measure proposes to amend Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act.[3] To understand the effect of the bill, it is necessary to have some appreciation of the original purpose and intent of the Robinson-Patman Act.

The major impetus for the Act arose out of a series of investigations into widespread practices by large distributors extracting from manufacturers and processors substantial buying preferences in the form of discriminatory discounts, rebates, false brokerage payments, and similar *unearned* allowances. One of these investigations was conducted by the Federal Trade Commission over a number of years, and it submitted a final report in 1934.[4] The Commission

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1 49 Stat. 1526 (1936).

2 This bill is numbered S. 11 in the Senate and H. R. 11 in the House of Representatives, 84th Congress, 1st Session. S. 11 was introduced on January 6, 1955, by Senator Kefauver and twenty nine other Senators. H. R. 11 was introduced on January 5, 1955, by Congressman Wright Patman of Texas. Both measures propose identical amendments to Section 2(b) of the Act.

3 15 U. S. C. 13(b).

4 S. Doc. No. 4, 74th Cong., 1st Session.

reported, for instance, that in interviews with 129 manufacturers in the grocery group, 76 admitted that they gave preferential treatment in some form. Thirty three of the manufacturers interviewed stated positively that threats and coercion had been used by favored buyers to obtain the preferences they gained. The Patman Committee in the House conducted an investigation and found in its report, filed in 1936, that advertising and sales promotional allowances were being given to a few mass buyers amounting to millions of dollars each year and were little more than a disguise for discriminatory price concessions.[5]

These investigations gave support to demand that the then existing Clayton Act provisions against harmful price discriminations be strengthened. The result was an almost unanimous approval in Congress for the Robinson-Patman Act.[6]

Section 2(a) of the Act prohibits price discriminations in the course of interstate commerce between purchasers of commodities of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly, or to injure competition with either the grantor of the discrimination (the seller) or his customers or with one who knowingly receives the discrimination (the favored buyer). However, by specific provisions, nothing in the Act prevents differentials "which make only due allowance for differences in cost of manufacture, sale or delivery resulting from the differing methods of quantities" of a sale or delivery, or price changes "in response to changing conditions affecting the market or the marketability of the goods concerned." In addition, the Act does not prevent sellers "from selecting their own customers in bona fide transactions and not in restraint of trade." [7]

Thus it can be shown that while the law suppresses discriminations which are harmful to competition, it recognizes the need for allowing price differentials supported by sound differences in the cost of serving various purchasers as well as changing market conditions and the desirability for preserving the freedom of sellers to choose with whom they do business. The law is thus framed to preserve the incentive for market efficiencies by allowing cost savings to be reflected in lower prices to purchasers.

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5 House Report No. 2679, 74th Congress, 2nd Session.

6 80 Cong. Rec. 8242, 8418.

7 15 U. S. C. 13(a).

The Equality of Opportunity bill does not change these provisions contained in Section 2(a) of the Act. Instead it applies to Section 2(b) which presently states in relevant part as follows: "that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The Supreme Court construed this provision in *Standard Oil Co.* v. *Federal Trade Commission*[8] as establishing a complete defense to a charge of price discrimination irrespective of the injury to competition that may result. The Court, in a 5 to 3 decision (Mr. Justice Minton did not participate), disagreed with the position by the Federal Trade Commission that meeting competition should not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy or prevent competition.

The Equality of Opportunity bill provides that in place of the provision in Section 2(b) quoted above, there be inserted the following: *"That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show* that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." The italicized part is new language and replaces the following which is in the present law: "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing . . ."

The case in support of the Equality of Opportunity bill may be viewed first from the side of examining the weakness of permitting the defense of meeting of competition to remain as a complete defense in a proceeding where there is affirmative proof of a substantial lessening of competition or a tendency to create a monopoly.

The first and most serious criticism of this policy is that it undermines the basic purpose of the statute to protect the competitive system from injury that harmful price discriminations produce. It allows a private purpose to take precedence over the purpose of

[8] 340 U. S. 231 (1951).

Congress in enacting the law. By substituting "purpose" for "result" as a test of the prohibition, the public policy proscribing such harmful practices is easily frustrated.

The argument on the other side is, of course, that allowing sellers to meet competition by means of discrimination aids competition and is beneficial to the economy, particularly by helping to reduce prices to consumers.

However, close examination shows this claim to be false and that it is predicated upon several erroneous assumptions. The first of these is that a favored buyer-distributor who receives preferential treatment will use the advantage to reduce his resale price of the commodity. Actually, since his non-favored competitors do not receive the same proportional advantage, he is under less of an economic compulsion to reduce his resale price than if they were accorded the same treatment. The assumption that consumers benefit from such discrimination as a matter of course in the form of lower prices cannot be sustained. In a case involving the Automatic Canteen Company, preferential discriminations were given this buyer in some instances amounting to 33% lower than prices quoted other purchasers, yet compensating reductions in the prices did not reach the consumer. Instead, the Commission found that it had used the discriminatory advantage given it at least in part to help attain a dominant position in the market.[9]

The second false assumption behind the argument on behalf of making "meeting competition" a complete defense in a case involving injurious price discriminations is that if a seller is denied this defense he will follow the course of not reducing his price to any of his purchasers.

Before reaching the heart of this contention, it should be pointed out that contrary to the implied presumption underlying this view, harmful discriminatory practices are not always entered into on the sellers' own initiative as a matter of self defense against a competitive price attack. Often an unscrupulous buyer will exert pressure on his supplier to discriminate in his favor.

In the *Automatic Canteen Company* case referred to above, the Commission summarized the buyer's activities in these terms: "Respondent used various methods to induce its suppliers to grant

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[9] *Automatic Canteen Company of America*, F. T. C. Dkt. 4933 (1950).

discriminatory prices. One of these was to inform prospective suppliers of the prices and terms of sale which would be acceptable to the respondent without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below prices at which the particular supplier sold the merchandise to others. . . ." [10] In instances like this a discriminatory price is not a method of meeting competition by a seller, but a method of destroying competition.

However, even in circumstances where the seller faces stiff competition, it is not true, as Professor Alfred E. Kahn has pointed out, to assume that if he cannot meet the situation by means of discriminatory prices, he will not reduce his price at all.[11] It may be more likely in many situations that competitive conditions will force him to lower his price for all his competitive purchasers in the market where he wishes to meet the price of a strong competitor. The advantage of this method of reducing prices over a discriminatory reduction for one buyer only is obviously so much more preferable from an economic point of view, that it should be encouraged rather than discouraged.

Supporters of the view that the defense of meeting competition should be a complete defense often concentrate their attention on the lower discriminatory price given to the favored buyer. However, as Professor Kahn points out: "But if the lower price is a response to competition, the higher price reflects weaker competition, or as the economist uses the term, some degree of monopoly power . . . The *selective* price concession, offered to some buyers only, is at best a limited form of price competition, and not necessarily the best kind attainable." [12]

To carry this thought further, it is important to note that a "price discrimination" is not synonymous with a "price cut" in so far as the broad economic effect is concerned. Consumers are as a general rule far more likely to receive the benefits of price reduc-

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10 See *Automatic Canteen Company of America* v. *F. T. C.*, 346 U. S. 61 (dissenting opinion).

11 Report of the Attorney General's National Committee to Study the Antitrust Laws 186.

12 *Ibid.*

tions if "price cuts" are available to all competing buyers than if "price discriminations" are given to a single buyer who is accorded preferential treatment beyond a reflection of cost savings to the supplier in serving him.[13]

Another weakness of permitting the defense of meeting competition to remain as a complete defense in instances where the Federal Trade Commission shows by affirmative proof that a substantial injury to competition is likely to result from a discrimination is that this procedure substitutes the remedies of retaliation in kind for those provided and intended by the Act. This is particularly true if, as is contended by some, the defense permits the meeting of unlawful prices and sanctions a systematic and continuous discriminatory practice.[14]

If the Act is so construed, sellers would be left to the mercy of unscrupulous buyers demanding preferential treatment which they did not deserve. And by the same token, scrupulous and fair-minded business men would be placed at a serious disadvantage wherever a competitor sought and gained an unearned price advantage through furtive means. Thus both buyers and sellers desirous of dealing on a basis of fairness and equity would be left in an exposed condition, and their high minded ideals would prove costly to them. Eventually the higher standards of the many would be forced to the lower levels of the few as a matter of required self-protection.

Turning now in a slightly different direction, what would be the legal effect on the rights of sellers to meet a lower price of a competitor under the Robinson-Patman Act if the Equality of Opportunity bill were enacted?

First, just as now, the seller would have freedom to meet a competitor's price by non-discriminatory means. He could follow the most beneficial policy from the public point of view by placing into effect a general price cut for all his customers. If he wished to give a lower price to meet a competitive price attack in a particular market, he could offer his reduced price to all his purchasers competing in that market, provided that in so doing he did not carry on

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13 This point is developed further in an article by Robert Wallace and Senator Paul Douglas 19 U. of Chi. L. Rev. 1 (1952).

14 Report of the Attorney General's National Committee to Study the Antitrust Laws 181, 182.

such policy in a manner as to create a "substantial tendency toward a monopoly" at the primary level of competition.[15]

This standard would apply also in cases involving alleged competitive injury to purchasers where the differential in prices was between competing purchasers in a market, since the bill would disallow the defense of meeting competition only where the Federal Trade Commission or a private litigant showed by substantial evidence that the effect of the discrimination was substantially to lessen competition or a tendency to create a monopoly.

A seller could therefore continue to avail himself of the defense successfully if the Commission was unable to show by affirmative proof that at the very least there was a "reasonable possibility" [16] of substantial injury to competition or a tendency to create a monopoly. A discrimination of lesser magnitude which would otherwise be prohibited under the second competitive injury test in Section 2(a), namely, "to injure, destroy, or prevent competition with any person who either knowingly receives the benefit of such discrimination, or with customers of either of them" could be justified under the proposed amendment providing, of course, a greater injury to competition in general was not established.

This analysis assumes that there are two competitive injury tests in Section 2(a), the last one referred to above being added by Congress to broaden the prohibitions of the Act when in 1936 it approved the Robinson-Patman Act amendments to the Clayton Act. The legislative history and intent of this action shows that Congress felt that requiring general injury to competitive conditions was too restrictive.[17]

There is a lack of convincing evidence to support the view that the only injury test applicable under Section 2(a) centers on injury to competition generally.[18]

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15 *General Foods Co.*, F. T. C. Dkt. No. 5675 (1954).

16 *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948). However, the Commission now seems to have adopted a more rigorous standard, namely, the substantiality of the effects reasonably probable. *General Foods Co.*, F. T. C. Dkt. No. 5675 (1954).

17 Senate Report No. 1502, 74th Congress, 2nd Session.

18 The report of the majority of the members of the Attorney General's Committee to Study the Antitrust Laws advocate something approaching this view, and in so doing seems to suggest that the general injury test is the only one applicable, thus in practical effect reading the more limited test added by Congress in 1936 out of the

If nevertheless this view is followed by the Commission and the courts, then it must follow that the amendment to Section 2(a) enacted in 1936 brought about no real change in this particular respect.

It can be validly asserted therefore that while the Equality of Opportunity bill is a measure for strengthening the Robinson-Patman Act, it does not introduce a departure from the basic policy of the Act as it was originally intended.

In essence, the bill represents a workable compromise between the interpretation that the meeting competition proviso in Section 2(b) is a procedural defense only, which the Federal Trade Commission followed in the *Standard Oil* case prior to the Supreme Court's decision, and the meaning given it as a complete defense which the Supreme Court adopted in that case.

Antitrust laws are generally believed to represent a legislative effort to draw a line between a legitimate use of economic power and an abuse of that power. The purpose is always to protect the public.

One important way of effectuating this purpose is the preservation of equality of opportunity in the market. By keeping open the channels of opportunity to business, irrespective of size, so that efficiency and not overshadowing power will determine success, encouragement can be given those incentives that make possible the creative initiative upon which our competitive system rests. A vital part of any effective effort to do this rests on an anti-discrimination policy which prohibits practices that substantially injure the competitive system irrespective of what private interest or motivation is involved. There should be no complete defense to discriminatory practices from which such injury flows.

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statute. See Committee Report 160-166. While it may be said that the Commission and the courts in construing the injury provisions under Section 2(a) have generally made no clear distinction between the two standards provided for, this is probably due to the fact that no issue necessitating such distinction was required in the cases presented. This would not be true if the proposed amendment were enacted.

ANTITRUST NEWSLETTER

Supreme Court — October Term, 1955

Principal interest to the Antitrust Bar are three cases appearing on the October Docket of the Supreme Court.

Dkt. 5—*United States* v. *E. I. du Pont de Nemours and Co.*, 118 F. Supp. 41 (D. C. Del. 1953). This case was argued October 11, 1955. Action was brought by the government against du Pont for violation of the Sherman Act. Defendant in the district court was held to be not guilty of monopolizing the cellophane products industry. The defense was based upon the particular market situation in terms of economic position and the particular industry. In testing monopoly, the Court said the defendant had neither the power to raise prices or to exclude competition.

Dkt. 132—*Halophane Co., Inc.* v. *United States,* 119 F. Supp. 114 (D. C. Ohio, 1954). Jurisdiction was noted by the Supreme Court, October 10, 1955. The case involves a district court decision holding a manufacturer of prismatic glassware and illuminating appliances guilty of engaging in a conspiracy in restraint of trade and therefore violative of Section 1 of the Sherman Act.

Dkt. 151—*United States* v. *E. I. du Pont de Nemours and Co.*, 126 F. Supp. 235 (D. C. Ill. 1954). Jurisdiction was noted by the Court October 10, 1955. The district court dismissed a complaint brought by the government charging a violation of the Sherman and Clayton Acts by the defendants. The defendants are separate corporations engaged in the manufacture of chemicals, automobiles and rubber products and had a relationship to one another by stock ownership and other means. It was maintained by the government that a conspiracy to restrain and monopolize trade existed whereby the products of the interrelated companies were preferred over competitor's products. An unlawful acquisition of stock of one defendant by another was also alleged.

Books

Aaronovitch, S., MONOPOLY IN BRITAIN, International Publishers, 381 4th Ave., New York 16, N. Y. (1955), Pp. 191, $2.50.

A study of the alleged growth of monopoly in Britain during recent decades. This represents an example of extreme leftist thinking on the subject.

also:

Stelzer, E. M., SELECTED ANTITRUST CASES: LANDMARK DECISIONS IN FEDERAL ANTITRUST LAW, Richard D. Irwin, Inc., Homewood, Ill. (1955), Pp. 210, $3.50.

Activities

Corwin Edwards will deliver the main address when the Federal Bar Association of New York, New Jersey and Connecticut holds its annual symposium on current Trade Regulation Problems. The symposium will be entitled "TWENTY YEARS OF ROBINSON-PATMAN—RECORDS AND ISSUES." Sigmund Timberg, Chairman and Malcolm A. Hoffmann, Secretary of the Committee on Trade Regulation have announced that in addition to Corwin Edwards, other members of the panel will include Cyrus Austin, Abraham Lowenthal, Joseph W. Burns and Lawrence Apsey. The symposium will be held at the U. S. Court House, Foley Square, New York City, at 8:00 p. m., December 8, 1955. Federal Legal Publications, Inc. will publish the proceedings.

The Association of the Bar of the City of New York has tentative plans for three trade regulation meetings during the 1955-56 season. It is planned to have meetings devoted to ANTITRUST PROBLEMS IN FOREIGN COMMERCE, ECONOMIC PROOF IN ANTITRUST CASES and the annual lecture given by Prof. Milton Handler. As each session materializes both in substance and as to dates the BULLETIN will inform its readers in this section.

Notes

Reynolds C. Seitz, Dean of the Marquette University Law School, has organized a continuing legal education course at Marquette in conjunction with the Milwaukee Bar Association. The program

calls for a once a week class on Trade Regulation. Each week will be devoted to a different area of the subject. Further, leading members of the Milwaukee Bar will lecture on the various phases of Trade Regulation.

Senator Joseph C. O'Mahoney (D., Wyo.) has been authorized to act as chairman of the Senate Antitrust and Monopoly Subcommittee inquiring into the significance of corporate size in the automotive industry. In his statement, Sen. O'Mahoney said that the hearings, which are scheduled to resume November 8, 1955, are not an "Investigation" but a "Study." It is often amusing how the choice of words becomes ridiculously important. Query—should the "Study" uncover practices looked upon with disfavor by the Subcommittee, would the careful selection of words have significance?

The Practices and Procedures Committee of the Antitrust Section of the ABA is presently making a study of H. R. 7309. This is a bill to study the Antitrust Civil Process Act of 1955. The bill provides for a civil investigative demand for the Attorney General in the investigation of Civil Antitrust Matters. The Committee study of H. R. 7309 will form the basis of a report and recommendation.

There have been approximately 77 judgments entered in cases instituted by the Government requiring defendants to make available to existing or prospective competitors certain of their patents; and approximately 27 judgments require the furnishing of know-how or technical assistance.

The Antitrust Division is currently preparing for publication a booklet listing the products or processes covered by judgments requiring defendants to make available certain of their patents, technical information or technical assistance. It is expected that the booklet will list the names and addresses of the companies involved and, insofar as possible, the terms upon which such licenses or know-how may be obtained. (From—Address by Honorable Herbert Brownell, Jr. before the Small Business Administration National Council of Consultants, Thursday, July 14, 1955.)

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